CONCURRING STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN

Re: Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks, WT Docket No. 07-53

In this Declaratory Ruling, the Commission clarifies the regulatory framework for wireless broadband services. We determine that the treatment should be consistent with the framework established for broadband Internet access services provided over cable modem, wireline broadband, and power line facilities. While I have reservations with several aspects of this approach and the lack of public input into this process, I generally support this Declaratory Ruling because it is consistent with our broader efforts to treat similar services in a similar manner across technology platforms.

Now that we have put these providers on similar footing, it is high time to turn to protecting consumers in the broadband age. In fact, it is frustrating that the Commission is able to generate yet another reclassification item while the *Broadband Consumer Protection Notice* that we adopted over 18 months ago, and that will form the centerpiece of our consumer protection policies in this new framework, remains pending. Instead, we are devoting resources to an item that was not even specifically teed up by an interested party nor put out for public comment. Of course, some might say it is a lot easier to generate an item quickly when there is no record to consider. Perhaps the handwriting was on the wall, with no nuance to consider. But looking at the strained legal analysis in this item and the questions left unanswered, it is hard to see how specific public input would not have benefited this item.

The goal of this Declaratory Ruling is ostensibly to promote wireless broadband deployment. It is hard to fathom how it is likely to make much difference in the near term considering that no party bothered to ask us to formally consider it. It is hard to see how clarifying the regulatory classification will promote deployment when nobody was saying it was ever an impediment.

Rather than just going through the motions, I have made promoting wireless broadband deployment one of my key goals while at the Commission. Fostering deployment is so important because we continue to see a residential broadband market in which, according to FCC statistics, telephone and cable operators control a nearly 98 percent share, with many consumers lacking any meaningful choice of providers. So, if we are to give our communities the communications tools to compete on the global economic stage, it is critical that we take steps to promote much-needed competition in the provision of broadband services.

In many different proceedings, I have made wireless broadband deployment a priority and have actively worked with industry to secure real deployment. For example, I personally worked with Sprint and Nextel to secure significant build-out commitments from the companies to launch service in the 2.5 GHz band in association with their merger. The companies provided a specific schedule of implementation milestones that signal a commitment to deploy wireless broadband to at least 30 million Americans across 20 markets, both large and small. The infusion of capital into this market should stimulate product and service offerings that ultimately will benefit both the commercial and educational segments of the 2.5 GHz industry.

Similarly, I put a strong emphasis on promoting the availability of affordable wireless broadband services through our review of the AT&T-BellSouth merger. I worked closely with AT&T to secure the company's commitment to launch service in the under-used 2.3 GHz band by agreeing to a specific construction commitment over the next three and a half years. In addition, the applicants committed to divest 2.5 GHz band licenses and leases held in the southeast, which will lead to the deployment of wireless broadband services in this market in direct competition to the newly formed company.

I have also jumpstarted wireless broadband efforts in the 2.5 GHz band by pushing the Commission to adopt more significant construction safe harbors. I believe the 2.5 GHz band has so much potential, and we already are seeing companies provide broadband services in dozen of markets across the country. I also pushed for more meaningful safe harbors in association with the construction extension afforded the 2.3 GHz industry. But I was unsuccessful in that effort because others would not support a greater commitment to wireless broadband deployment in conjunction with a three-year construction extension.

So it is against that backdrop that I review the item before me. At bottom, the legal approach we take here may not be my preferred option but I concur in today's decision for the same reasons that I concurred in our previous reclassification decisions.[1] As I made clear at the time we adopted the *Wireline Broadband Internet Access Order*, the reclassification approach raises some difficult questions about the legal and policy framework for broadband services. My underlying concern with the reclassification approach has always been that it takes the Commission outside the ambit of those core legal protections and grounding afforded by Congress. Yet, I have been willing to move forward because we are acting in a manner consistent with the Supreme Court's guidance in the *Brand X* decision, and this Declaratory Ruling, in turn, will give us an opportunity to adopt a consistent approach for cable, wireline, power line broadband, and now wireless broadband services.

But even as we move forward with this decision today, it is worth mentioning some of the important issues that we should make our first priority – chief among those is the protection of consumers. Indeed, my support for the reclassification approach has been conditioned on the Commission's decision to use its Title I authority to address important consumer protection and other concerns that remain relevant no matter how we classify broadband. I premised my support for the *Wireline Broadband Internet Access Order* on our decision to adopt a concurrent and important *Broadband Consumer Protection Notice* that sought comment on how we can ensure that we continue to meet our consumer protection obligations in the Act. It has now been 18 months since we opened that inquiry, so it is more important than ever that we make this proceeding a top priority.

Consumers must be at the top of our list, not the bottom, as we move into the broadband

[1] Concurring Statement of Commissioner Jonathan S. Adelstein, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, FCC 05-150, Report and Order and Notice of Proposed Rulemaking (August 5, 2005) (*Wireline Broadband Internet Access Order and Broadband Consumer Protection Notice*). Concurring Statement of Commissioner Jonathan S. Adelstein, *United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service*, WC Docket No. 06-10, FCC 06-165, Memorandum Opinion and Order (November 3, 2006).

era. Our experience with the widespread and unauthorized proliferation of consumer telephone call records has been a sharp reminder that this Commission has an obligation to ensure that consumers' privacy expectations are met. But that privacy concern is not limited to the narrowband world. Consumers don't care whether their sensitive information is transferred by copper wire, fiber optic cable, a power line connection, or a wireless broadband link. They merely want us to implement and enforce the legal protections afforded by Congress.

We also need to advance the discussion of other sensitive issues, like our Truth-in-Billing rules, access for persons with disabilities, and the preservation and advancement of universal service. Universal service is a particularly critical because the Commission has a statutory obligation to ensure the sound footing of our federal programs that ensure access for school, libraries, low income consumers, and Rural America. This item also affects the jurisdictional classification of wireless broadband services without exploring the implications for consumer protection or universal service.

Finally, I am troubled with a couple of specific aspects in our Declaratory Ruling. One suggested reason for this decision is that it will provide regulatory certainty to wireless broadband Internet service providers. But we must be careful in drawing such a bright line between wireless broadband services and commercial mobile services and the regulatory protections that come with CMRS status. Those protections can be important for many small wireless providers, so we must be careful not to violate the tenet of 'First, Do No Harm' in drawing such a firm distinction. Moreover, to get to that distinction, the Commission engages in some legal gymnastics, particularly the conclusion that an interconnected mobile wireless broadband Internet access service should not be considered a commercial mobile service. In our bid to provide regulatory certainty, we must be careful not to leave providers to rely on such a tenuous legal framework.

For all these reasons, I concur in this Order.